



May 8, 2014

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, Notice of *Ex Parte* Communication

Dear Ms. Dortch:

The National Association of Broadcasters, Arizona Broadcasters Association, California Broadcasters Association, Maine Association of Broadcasters, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, New Hampshire Association of Broadcasters, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., Ohio Association of Broadcasters, Pennsylvania Association of Broadcasters, Texas Association of Broadcasters, Vermont Association of Broadcasters, Washington State Association of Broadcasters, and Wisconsin Broadcasters Association respectfully call upon the Federal Communications Commission ("FCC" or "Commission") to complete its statutorily required international coordination with Industry Canada and the *Secretaria De Comunicaciones y Transportes* regarding the allotment of channels to television broadcasters near the borders before conducting the 600 MHz incentive auction. As explained further in this *ex parte* filing and the attached declaration, fulfilling these statutory requirements will require negotiating new agreements with Canada and Mexico *before* the incentive auction begins. Doing so will also prevent the risk of substantial cross-border interference, guarantee that the maximum amount of spectrum is available for the forward auction, and ensure that television broadcasters that participate in the reverse auction are fully reimbursed.

Because negotiating these agreements will take substantial time, and given that the auction is currently scheduled for mid-2015, the Commission should specify in its forthcoming incentive auction order that it will complete new agreements with Canada and Mexico prior to the auction. Any failure to clearly address this issue in the order will require impacted parties to take all steps necessary to protect their interests.

Pursuant to Section 1.1206 of the Commission's rules, this letter is being electronically filed with your office. Please let me know if you have any questions regarding this filing.

1771 N Street NW  
Washington DC 20036 2800  
Phone 202 429 5300

Sincerely,



Rick Kaplan  
Executive Vice President, Strategic Planning  
National Association of Broadcasters

/s/  
Art Brooks  
President and CEO  
Arizona Broadcasters Association

/s/  
Stan Statham  
President and CEO  
California Broadcasters Association

/s/  
Suzanne D. Goucher  
President and CEO  
Maine Association of Broadcasters

/s/  
Jordan Walton  
Executive Director  
Massachusetts Broadcasters  
Association  
and  
Executive Director  
New Hampshire Association of  
Broadcasters

/s/  
Karole White  
President  
Michigan Association of Broadcasters

/s/  
James P. DuBois  
President and CEO  
Minnesota Broadcasters Association

/s/  
Paula Maes  
President and CEO  
New Mexico Broadcasters Association

/s/  
David L. Donovan  
President  
The New York State Broadcasters  
Association, Inc.

/s/  
Christine H. Merritt  
President  
Ohio Association of Broadcasters

/s/  
Richard E. Wyckoff  
President  
Pennsylvania Association of  
Broadcasters

/s/  
Oscar Rodriguez  
President  
Texas Association of Broadcasters

/s/  
James O. Condon  
Executive Director  
Vermont Association of Broadcasters

/s/  
Mark Allen  
President and CEO  
Washington State Association of  
Broadcasters

/s/  
Michelle Vetterkind  
President and CEO  
Wisconsin Broadcasters Association

## **BACKGROUND**

The plain text of the Spectrum Act,<sup>1</sup> its purpose, and the Commission's own statements make clear that the Commission cannot conduct the incentive auction until it has reached international agreements with Canada and Mexico concerning the channel allocations for television stations located on the border. A failure to engage in international coordination prior to the auction would also substantially hamper Congress's goal in the Spectrum Act of maximizing the amount of spectrum available for wireless carriers while not harming television broadcasters.

On February 22, 2012, Congress passed the Spectrum Act, which, among other things, gave the FCC the authority to conduct an incentive auction through which broadcasters can voluntarily relinquish some of their spectrum to be auctioned to wireless carriers. As described in the Spectrum Act, and in the FCC's October 2, 2012, Notice of Proposed Rulemaking ("NPRM"), the incentive auction will comprise three parts: (1) a "reverse auction" during which broadcasters will relinquish spectrum in return for financial compensation; (2) a process of "repacking" during which the FCC will reorganize the remaining broadcast television bands so that television stations occupy a smaller part of the ultra high-frequency (UHF) band; and (3) a "forward auction" in which wireless carriers will bid for blocks of the newly available spectrum.

In order for the FCC to achieve its goal of making the maximum amount of new spectrum available, stations must be repacked into the minimum amount of space needed for them to conduct their broadcast operations. There are, however, certain external limits on the FCC's ability to repack as it sees fit. Relevant here is the requirement that the FCC coordinate with counterpart regulatory agencies in Canada and Mexico to allot channels in a manner that prevents interference among stations on opposing sides of the border. Prior negotiations have yielded various agreements and letters of understanding between the FCC and regulatory authorities in Canada and Mexico. Those agreements assign specific frequencies to stations in border areas in order to avoid interference, and also set forth procedures for reassigning broadcasters in these areas to new channels. Recognizing the importance of this type of international coordination, Congress specifically required in the Spectrum Act that the FCC consider these border issues attendant to the incentive auction:

- (1) IN GENERAL. – For purposes of making available spectrum to carry out the forward auction under subsection (c)(1), the Commission –
  - ...
  - (B) may, *subject to international coordination along the border with Mexico and Canada* –
    - (i) make such reassignments of television channels as the Commission considers appropriate; and

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<sup>1</sup> Pub. L. No. 112-96, 126 Stat. 156 (2012).

(ii) reallocate such portions of such spectrum as the Commission determines are available for reallocation.<sup>2</sup>

In the NPRM, the FCC also recognized the importance of international coordination, noting its obligation to “coordinate any changes in the authorizations of television stations operating in the border regions with Canada and Mexico.”<sup>3</sup> The FCC further stated the “Commission’s intent to work with the U.S. Department of State and telecommunications officials in Mexico and Canada on new bilateral instruments, as appropriate, to provide for flexibility in these frequency bands to our mutual benefit.”<sup>4</sup> And, in public statements, the FCC Commissioners have also noted the significance they place on coordination efforts with Canada and Mexico.<sup>5</sup>

Nonetheless, the FCC has not concluded new international coordination agreements with Canada and Mexico, and it appears not to be planning to conclude such agreements prior to the auction.<sup>6</sup> As a practical matter it can take many months or years for a neighboring country to agree to a single channel reassignment—let alone to a complete table of channel allotments.<sup>7</sup> By contrast, the incentive auction once started will be completed in a matter of weeks. As a result, if the FCC does not reach agreements with Canada and Mexico on station assignments prior to the auction, it will not be able to do so before it needs to reassign stations through the repacking process during the auction.

## **ANALYSIS**

The text of the Spectrum Act, its purpose, and the Commission’s own statements demonstrate that the FCC must conclude new agreements with Canada and Mexico *before* conducting the incentive auction. Failure to do so could result in substantial cross-border interference, a reduction in the amount of spectrum available for auction,

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<sup>2</sup> *Id.* § 6403(b)(1), 126 Stat. at 226 (emphasis added).

<sup>3</sup> See *In re Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd 12,357 (“NPRM”), 12,371 ¶ 34 (2012).

<sup>4</sup> *Id.* at 12,372.

<sup>5</sup> For instance, Commissioner Mignon L. Clyburn noted in a letter to Congress that “[t]he Commission and State Department have been engaged in on-going discussion with both Canada and Mexico on border issues related to the incentive auction process . . . . At separate meetings with these counterparts in early November the FCC will reiterate the need to continue spectrum coordination discussions related to the U.S. incentive auction.” Letter from Acting Chairwoman Mignon L. Clyburn to Hon. Amy Klobuchar (Oct. 31, 2013) at 1. As recently as January 30, 2014, Chairman Wheeler commented in an open meeting that “[i]nternational coordination is important to the success of the incentive auction, and Commissioner Clyburn’s recent visit to Mexico helped lay important groundwork for this historic auction.” And, the FCC’s informational presentations on the incentive auction all indicate that international cooperation is an ongoing part of preparation for the auction. See FCC, *The Path To A Successful Auction* (2014), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0130/DOC-325343A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0130/DOC-325343A1.pdf).

<sup>6</sup> See Attachment A, Declaration of Bruce Franca (“Franca Decl.”) ¶ 17. Indeed, in testimony before Congress, Chairman Wheeler noted that the FCC does not expect to have concluded international agreements with Canada and Mexico prior to the incentive auction. See *Oversight of the FCC: Hearing Before the . Subcom. On Commc’ns &Tech. of the H. Comm. On Energy & Commerce*, 113th Cong. (Dec. 12, 2013).

<sup>7</sup> See Franca Decl. ¶¶ 8, 16, 21, 22.

and a failure fully to reimburse broadcasters for relocation as required by the Spectrum Act.

*A. The Text Of the Spectrum Act Requires That the Commission Comply With International Agreements Or Negotiate New Ones Before Repacking Spectrum*

As noted above, the Spectrum Act requires that any repacking the FCC undertakes as part of the incentive auction be “subject to international coordination.”<sup>8</sup> Caselaw interpreting the phrase “subject to” supports the common sense interpretation of that term—namely, that a party must at a minimum ensure its actions do not violate existing legal requirements. In *Head v. University of Missouri*,<sup>9</sup> for example, a professor who was appointed to his office “subject to law” argued that his appointment was subject only to those laws in existence at the time he was appointed and that the appointment was in effect immune from any future laws the legislature might pass. The Court rejected this argument and held that the professor “accepted his office subject to the laws then in existence, *and* subject to the passage of such subsequent laws as should seem wise to the legislature.”<sup>10</sup> In reaching this conclusion, the Court noted “[t]hat [the professor] and his office and contract were subject to the laws in existence at the time of making it, was sufficiently evident without any declaration on the point. All persons and contracts are in that condition.”<sup>11</sup>

This same fundamental concept has been elucidated in courts of appeals as well. For example, the D.C. Circuit has explained , although “subject to” can in some cases mean “affected by,” when used as part of a statutory mandate, “it is typically given a narrower cast: an entity is ‘subject to’ a particular legal regime when it is regulated by, or made answerable under, that regime.”<sup>12</sup> And the Fifth Circuit observed in *Texaco, Inc. v. Duhe*,<sup>13</sup> that natural gas became “subject to an existing contract” when it was “governed by” the terms of that contract.

These cases and the Act’s text make clear that, when conducting the incentive auction, the FCC cannot act in violation of existing agreements. Those agreements require coordination with Canada and Mexico regarding the frequencies assigned to specific stations and also lay out cooperative steps that must be taken if the assignments are to change.

Indeed, the FCC is on the record recognizing that the Spectrum Act imposes international coordination requirements as part of the repacking process.<sup>14</sup> In the

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<sup>8</sup> See, e.g., *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 173 (2009) (“We begin, as always, with the text of the statute.” (quotation marks omitted)).

<sup>9</sup> 86 U.S. 526 (1873).

<sup>10</sup> *Id.* at 530 (emphasis added).

<sup>11</sup> *Id.* 530-31.

<sup>12</sup> *United States ex rel. Totten v. Bombadier*, 28 F.3d 542, 547 (D.C. Cir. 2002).

<sup>13</sup> 274 F.3d 911, 918-19 (5th Cir. 2001).

<sup>14</sup> Under the traditional standard of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984), if a statute is unambiguous an agency must give effect to Congress’s intent, and if a statute is ambiguous an agency must adopt a permissible and reasonable interpretation of the statute. For the reasons stated in this filing, the Spectrum Act unambiguously requires that the FCC conclude international coordination



NPRM, the FCC said it was required to “coordinate any changes in the authorizations of television stations operating in the border regions with Canada and Mexico,” and also noted its “intent to work with the U.S. Department of State and telecommunications officials in Mexico and Canada on new bilateral instruments, as appropriate, to provide for flexibility in these frequency bands to our mutual benefit.”<sup>15</sup> Moreover, in his testimony before Congress, Chairman Wheeler recognized the importance of “mov[ing] negotiations] forward,” even while acknowledging that formal agreements would not actually be signed. Then-acting Chairwoman Clyburn also made statements acknowledging the need for the FCC to coordinate with Canada and Mexico as part of the incentive auction.<sup>16</sup>

*B. The Practical Realities Of the Incentive Auction Require That the FCC Negotiate New Agreements To Satisfy the Requirement Of “International Coordination”*

The relevant history on international coordination and the realities of the incentive auction require the FCC to negotiate new agreements with Canada and Mexico before the incentive auction. To begin with, the relevant administrative history demonstrates that the phrase “international coordination” as used in this context encompasses both the negotiation of an agreement (including an approved table of allotments and agreed-upon processes for individual channel reassignments) and the use of the agreement’s procedures to reassign individual broadcasters to new channels.<sup>17</sup> The digital television (“DTV”) transition is the closest analog to the incentive auction. That transition began in 1987.<sup>18</sup> As early as 1992, the FCC stated it had already “initiated *coordination activities* with both the Canadian and Mexican governments for proposed [DTV] allotments in the border areas. We expect to address *coordination agreements* . . . in a timeframe *consistent with our allotment and assignment schedule*.”<sup>19</sup> By 1997, the FCC had “*coordinated* the DTV Table with the Canadian and Mexican administrations and believe[d] that it [would] be generally acceptable to them” such that “only minor adjustments [would] be necessary to conform the Table to [interim agreements on

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agreements with Canada and Mexico prior to the commencement of the incentive auction. However, even were a court to determine that the phrase “subject to international coordination” is ambiguous, it would be unreasonable for the FCC to interpret that phrase to mean that international coordination agreements can be reached after the auction concludes.

<sup>15</sup> See *supra* at p. 2.

<sup>16</sup> See *supra* at n.5. While the FCC could change its position in the final rule, if it does so, it must acknowledge the change in position and explain “that the new policy is permissible under the statute, that there are good reasons for it, and that the [the FCC] *believes* it to be better.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). For reasons we set forth below, the FCC cannot satisfy that standard.

<sup>17</sup> The FCC’s interpretation of what constituted international cooperation during the DTV transition is significant because “Congress is presumed to be aware of established practices and authoritative interpretations of the coordinate branches.” *United States v. Wilson*, 290 F.3d 374, 357 (D.C. Cir. 2002); see also *Nat’l Lead Co. v. United States*, 252 U.S. 140, 147 (1920) (“Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government.”)

<sup>18</sup> Franca Decl. ¶ 8.

<sup>19</sup> *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5376, 5385 ¶ 49 (1992).

DTV].”<sup>20</sup> And, by 2000, the FCC had entered into formal agreements with Canada and Mexico establishing respective tables of allotments and procedures for reassigning broadcasters. Throughout the remainder of the transition, which was completed in 2009, there were isolated allotments that required further “international coordination” through the agreements’ procedures.<sup>21</sup>

In the current situation, in order to repack stations, the Spectrum Act’s “international coordination” provision will require that the FCC do one of the following: (a) comply with the existing tables of allotments negotiated with Canada and Mexico and leave U.S. stations where they are; (b) receive clearance from Mexico and Canada pursuant to the procedures in the existing agreements; or (c) sign and comply with new agreements with Canada and Mexico negotiated specifically attendant to the incentive auction.

The first option—deciding not to move border stations to new frequencies at all—is plainly not viable. Doing so would inflict at least two negative consequences. First, leaving border stations where they currently reside in the spectrum would mean that a substantial portion of the spectrum would not be repurposed, potentially necessitating a separate band plan for the borders. A fragmented, non-uniform, band plan that does not allow for the maximum amount of spectrum to be repurposed would defeat a major purpose of the Spectrum Act. Second, border stations would be left isolated in high channels, surrounded by wireless carriers, and television sets and antennas used to access those stations would consequently be purchased by relatively fewer consumers. This scarcity of demand would lead manufacturers to increase price, potentially resulting in the eventual elimination of this niche market. This option is thus not viable.

The second option is also infeasible as a practical matter. The current agreements between the United States and its neighbors lay out a “coordination”

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<sup>20</sup> *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14,588, 14,667 ¶ 171 (1997).

<sup>21</sup> See, e.g., *In re Amendment of Section 73.622(l), Final DTV Table of Allotments Television Broadcast Stations*, Report and Order, 23 FCC Rcd. 8233, 8233, 8237 ¶¶ 2 11 (2008) (approving application to substitute post-transition DTV channel 35 for channel 45 because the former was more likely to obtain clearance from Mexico and “[w]ere we to require [the broadcaster] to wait for us to complete coordination of channel 45, there is no certainty that [the broadcaster] would be able to complete construction of its DTV facilities by the end of the DTV transition”); *In re Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd 18,279, 18,295, 18,310 ¶¶ 39, 71 (2004) (noting that, as of 2004, there were “approximately 43 stations with DTV applications awaiting international coordination” but that channel elections would have to proceed prior to “resolution of every outstanding case of Canadian or Mexican coordination” and further explaining that the FCC would make “every effort in negotiation on their behalf” where “international coordination” was “require[d]” (emphasis added)); see also *In re Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Notice of Proposed Rulemaking, 22 FCC Rcd. 9478, 9511 ¶ 83 (2007) (authorizing “requests for extension of time” for construction deadlines “due to international coordination where resolution of the international coordination issue is truly beyond the control of the station”); cf. *In re Spectrum Five LLC*, Memorandum Opinion and Order, 26 FCC Rcd 10,448, 10,453 ¶ 15 (2011) (explaining, in the context of satellite licenses, that “[t]he Commission has consistently stated that applicants take Commission grants subject to the outcome of the international coordination process, and that the Commission does not guarantee the success of the required coordination” (internal quotation marks omitted)).

process to harmonize broadcasts and avoid interference. These agreements and subsequent letters of understanding contain detailed appendices that specify the precise channel assignments for the many broadcast stations that operate within 400 kilometers of the U.S.-Canada border, and within 275 kilometers of the U.S.-Mexico border.<sup>22</sup> The agreements also lay out specific steps each nation must take when considering implementing new digital television allotments.<sup>23</sup> To comply with these procedures, the FCC cannot wait until after the reverse auction to seek clearance from Canada and Mexico for its repacking plan. For the incentive auction to work as the FCC has proposed, all three parts of the auction—the reverse auction, repacking, and the forward auction—must occur in quick succession.

Yet the agreements with Canada and Mexico each lay out various time-consuming steps a party must take prior to reassigning a station. For example, in the agreement with Canada, if the new allotment will meet existing spacing requirements, the administration implementing the new allotment must notify the other country and wait 21 days to give the opportunity for an objection to be lodged.<sup>24</sup> If the new allotment does not meet current spacing requirements, then various studies must be performed and included with the notification, and 45 days must be provided for any notice of objection to be lodged.<sup>25</sup> Similarly detailed rules exist regarding Mexico.<sup>26</sup> This process will be all the slower as Canada and Mexico receive numerous applications concerning the many border stations that will need reassignment as a result of the auction. Given congestion in some border regions, there is reason to believe this process of reassignment will be particularly complex.<sup>27</sup> As a result, the process of determining where U.S. stations can be reassigned is likely to take well over a year. The incentive auction, by contrast, will likely take many weeks. The current agreements will not suffice given the realities of the incentive auction.

Therefore, in order to repack stations as part of the incentive auction, the FCC must choose the third route—negotiating a new pre-approved table of allotments with

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<sup>22</sup> See *Letter of Understanding Between the Federal Communications Commission of the United States of America and Industry Canada Related to the Use of the 54072 MHz, 76-88 MHz, 174-216 MHz, 174-216 MHz And 470-806 MHz Bands for the Digital Television Broadcasting Service Along the Common Border* (US-Canada Letter of Understanding) at Appendix 1A; *Memorandum of Understanding Between The Federal Communications Commission of the United States of America and The Secretaria De Comunicaciones y Transportes of the United Mexican States Related to the Use of The 54-72 MHz, 76-88 MHz, 174-216 MHz and 470-806 MHz Bands for the Digital Television Broadcasting Service Along the Common Border* (US-Mexico Memorandum of Understanding) at Appendix 1.

<sup>23</sup> See, e.g., US-Canada Letter of Understanding ¶ 6; US-Mexico Memorandum of Understanding ¶¶ 2-3.

<sup>24</sup> See, e.g., US-Canada Letter of Understanding ¶ 6.

<sup>25</sup> See *id.* ¶ 7.

<sup>26</sup> See US-Mexico Memorandum of Understanding ¶¶ 2-3.

<sup>27</sup> See Letter from Congressional Delegation of Massachusetts to FCC Chairman, Julius Genachowski (Oct. 22, 2012) (noting repacking issues are “particularly important in states such as Massachusetts where the options available to local TV stations, including those in concentrated markets such as Boston, are constrained due to international spectrum agreements with Canada”); Letter from Congressional Delegation of Ohio to FCC Chairman Julius Genachowski (Feb. 28, 2013) (noting repacking “is of particular concern because of the potential for loss of service to our constituents in the Cleveland-Akron, Toledo and Youngstown television markets that could result from coordinating frequencies with Canadian broadcasters”).



Canada and Mexico. The negotiation of the existing agreements took years of effort—starting in 1992, when Canada and Mexico were invited to participate in early DTV proceedings, and culminating in 1998 and 2000 respectively.<sup>28</sup> The FCC therefore must reach detailed coordination agreements prior to the incentive auction that specify what frequencies new stations will be assigned to. The countries could then together specify replacement channels (at lower frequencies) for stations on both sides of the border. Reaching these agreements would give border stations certainty before the start of the incentive auction regarding where they would be relocated to once repacking occurs. If some stations on the border end up exiting the industry and selling the portion of the spectrum they occupy, the FCC would have extra spectrum it could utilize in another manner or sell to wireless carriers.<sup>29</sup> This process would doubtless take time, but if the FCC fails to do this prior to the auction, it would not be able to do so once the auction is completed and much (if not all) of the available spectrum is assigned to non-border stations.

### *C. Coordination Efforts After the Completion Of the Incentive Auction Will Not Suffice*

Given the few public statements by the FCC Commissioners regarding their current coordination efforts,<sup>30</sup> and the FCC's silence with respect to the substance of the negotiations,<sup>31</sup> it appears that the Commission is planning to reach agreements with Canada and Mexico only *after* the auction. But this strategy is neither permissible under the Spectrum Act nor good policy.

The Spectrum Act provides “[t]he Commission may not complete more than one reverse auction . . . or more than one reorganization of the broadcast television spectrum.”<sup>32</sup> This single opportunity for repacking means that stations must be reassigned *before* the forward auction. Moreover, the FCC should not attempt to repack over an extended period of time—*i.e.*, complete the formal repacking after both the forward auction and subsequent negotiations with Canada and Mexico have concluded.

*First*, before it conducts the forward auction, the Commission must establish what parts of the spectrum will be auctioned off to wireless carriers, and what parts will be retained by broadcasters, including those that are repacked. It cannot make this

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<sup>28</sup> Franca Decl. ¶ 8.

<sup>29</sup> Because some stations will presumably decide whether to participate based on how much money they would receive for their spectrum, it may not be possible to get a complete picture prior to the auction.

<sup>30</sup> For example, Commissioner Clyburn has referenced the DTV transition as a model for international coordination for the incentive auction. She has noted that the language in the Spectrum Act—“subject to international coordination”—is the same language that the Commission used in its order concerning the 2007 DTV transition and suggested that this shows it may be applicable precedent. See *In re Advanced Television Systems and Their Impact Upon The Existing Television Broadcast Service*, Seventh Report and Order and Eighth Further Notice of Proposed Rule Making, 22 FCC Rcd. 15,581, 15,624-25 ¶¶ 103-105 (2007). Though her intentions are not clear, it appears the FCC is attempting to maintain maximum flexibility, including by coordinating after the auction, as it largely did in the 700 MHz auction.

<sup>31</sup> Franca Decl. ¶ 17.

<sup>32</sup> Spectrum Act § 6403(e), 126 Stat. at 229.

determination, however, without first coordinating with Canada and Mexico regarding what spectrum will be allocated for which purpose in order to avoid interference from across the border.

*Second*, practical timing considerations would prevent any attempt to repack border stations after the incentive auction has concluded. Once non-border stations are repacked and the rest of the relevant spectrum is auctioned off to wireless carriers, there may well be no space or opportunity to move border stations to new frequencies.<sup>33</sup>

*Third*, the FCC must make all reimbursements to stations affected by repacking within three years of the forward auction.<sup>34</sup> The process of ordering equipment and having it built for new frequency assignments is very time consuming and can take years.<sup>35</sup> If border stations are not informed of their new frequencies until well after the auction is concluded, they are unlikely to be able to obtain new equipment and have it installed before the reimbursement window closes.

*D. Other Sections of the Spectrum Act Require the FCC To Take Steps Prior To the Incentive Auction To Coordinate With Canada and Mexico*

Other provisions of the Spectrum Act support the need for the signing of new agreements with Canada and Mexico before the incentive auction.<sup>36</sup> For example, during repacking, “the Commission shall make all reasonable efforts to preserve, as of the date of the enactment of this Act, the coverage area and population served of each broadcast television licensee.”<sup>37</sup> In order to comply with this requirement, the FCC has proposed various approaches that would impose *de minimis* (0.5% to 2%) reductions in the populations served by each station. These proposals assume only *de minimis* interference will result from repacking, because there will be sufficient space in the portion of the spectrum assigned to broadcasters to accommodate all the stations that remain. Spectrum is already in short supply, however, and Canadian and Mexican stations on the other side of the border reduce further the frequencies available for reassignment.<sup>38</sup> Thus, absent coordination between the US and its neighbors on where stations will be placed in the spectrum, sufficient spectrum may not be available to ensure that only *de minimis* interference occurs.

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<sup>33</sup> Franca Decl. ¶ 26.

<sup>34</sup> See Spectrum Act § 6403(b)(4)(D), 126 Stat. at 227.

<sup>35</sup> Franca Decl. ¶ 26(c).

<sup>36</sup> Even if a court were to find that the FCC’s failure to conclude international coordination agreements prior to the incentive auction does not actually conflict with other sections of the Spectrum Act, it could still look to the sections discussed above to understand the meaning of “subject to international coordination.” As the Supreme Court observed in *United Savings Ass’n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” 484 U.S. 365, 371 (1988) (citations omitted).

<sup>37</sup> Spectrum Act § 6403(b)(2), 126 Stat. at 226.

<sup>38</sup> See Franca Decl. ¶ 12.

Absent coordination, therefore, two results are possible: either stations will have to accept greater than *de minimis* reductions in populations served, or repacking will not result in the maximum spectrum made available. If the former occurs, the FCC's failure to secure coordination agreements with Canada and Mexico prior to the incentive auction would constitute a failure to take "all reasonable efforts" to preserve the populations border stations serve. And if the latter occurs, and less than the maximum amount of spectrum is repacked for the forward auction, the central purpose of the incentive auction will be frustrated.

The FCC is also prohibited by the Act from "involuntarily modify[ing] the spectrum usage rights of a broadcast television licensee or reassign[ing] such a licensee to another television channel," unless the reassignment is in compliance with the Act or as a result of a violation of the terms of the license.<sup>39</sup> Yet a failure to agree on new assignments on the border prior to the incentive auction may lead to such involuntary modifications. As explained in a December 2012 letter from the Congressional Delegation of Washington to former FCC Chairman Genachowski: "[W]hen TV channels in Washington State are moved to clear a spectrum band for auction to cell phone companies, there will be fewer places to relocate them because the Canadians have rights to a number of the border channels . . . . As many as 14 of these [television stations] could have no place to be relocated when repacking occurs, meaning that they could be forced to cut power and lose viewers." If only a few stations are situated in higher frequencies in the spectrum, moreover, the equipment needed to access those stations would become more expensive and perhaps eventually obsolete. Under this scenario, the FCC would be "modify[ing] the spectrum usage rights of a broadcast television licensee" and reducing its coverage area and population served indirectly, when the Spectrum Act prohibits it from taking such actions directly. Courts have prohibited agencies from exactly this type of indirect action.<sup>40</sup>

*E. The FCC's Failure To Coordinate With Canada And Mexico Prior To the Incentive Auction Would Contravene the Basic Policy Goals Behind the Spectrum Act*

In addition to violating the Spectrum Act, failing to reach coordination agreements with Canada and Mexico prior to repacking would substantially hamper the achievement of Congress's goals. The Act (as well as the FCC's own NPRM explaining how it plans to implement the Act) reflects the intent to minimize the cost and disruption to

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<sup>39</sup> *Id.* at § 6403(g)(1)(A), 126 Stat. at 229.

<sup>40</sup> See *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 763 n.23 (3d Cir. 1982) ("To allow the indefinite postponement of a rule without compliance with the APA, when a repeal would require such compliance, would allow an agency to do indirectly what it cannot do directly."); see also *Jacobson v. Tahoe Reg. Planning Agency*, 558 F.2d 928, 947 (9th Cir. 1977) ("Although the agency relies upon its empty exchequer to assert that it cannot be held for damages, the agency may yet be subject to an injunction to keep it from doing indirectly that which it cannot do directly."), *superseded on denial of reh'g* 566 F.2d 1353 (9th Cir. 1977), *overruled on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Reg. Planning Auth.*, 440 U.S. 391 (1979).

broadcasters declining to participate in the auction while freeing up as much spectrum as possible.<sup>41</sup>

These goals are traceable to the National Broadband Plan, which announced that one of the key “drag[s] on innovation” was the lack of sufficient spectrum for wireless broadband.<sup>42</sup> As such, the FCC set itself the goal of “mak[ing] 500 megahertz newly available for broadband use within the next 10 years, of which 300 megahertz between 225 MHz and 3.7 GHz should be made newly available for mobile use within five years.”<sup>43</sup> In order to achieve this goal, the FCC recommended that “Congress should consider expressly expanding the FCC’s authority to enable it to conduct incentive auctions in which incumbent licensees may relinquish rights in spectrum assignments to other parties or to the FCC.”<sup>44</sup> Congress passed the Spectrum Act in large part to give the FCC this authority.<sup>45</sup> The “central goals” the FCC seeks to achieve through the incentive auction are to “repurpose the maximum amount of UHF band spectrum for flexible licensed and unlicensed use,” and “preserv[e] a healthy, diverse broadcast television service.”<sup>46</sup>

Congress was also concerned that border stations not be negatively impacted by repacking. In addition to the statutory language in § 6403(b)(1), a number of members of Congress specifically discussed international coordination during floor debate on the Spectrum Act. For example, Senator Leahy warned that “[f]urther repacking without appropriate protection could have serious consequences for stations in Vermont and elsewhere along the border.”<sup>47</sup> He thus called for “a new agreement that will ensure adequate spectrum exists for repacking in Vermont and elsewhere along the border.” Senator Levin, likewise, raised this concern: “One issue related to these auctions of particular interest to me is the uniqueness of our border states when it comes to spectrum signals. Broadcasters, including those in Detroit, Flint, Traverse City, Grand Rapids, and Lansing, have been concerned about potential interference of signals along

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<sup>41</sup> See NPRM, 27 FCC Rcd. at 12,361 ¶ 10 (“Our central goals are to repurpose the maximum amount of UHF band spectrum for flexible licensed and unlicensed use in order to unleash investment and innovation, benefit consumers, drive economic growth, and enhance our global competitiveness, while at the same time preserving a healthy, diverse broadcast television service.”).

<sup>42</sup> National Broadband Plan at 77; *see id.* at 78 (“In the case of commercial spectrum, the failure to revisit historical allocations can leave spectrum handcuffed to particular use cases and outmoded services, and less valuable and less transferable to innovators who seek to use it for new services.”).

<sup>43</sup> *Id.* at 75.

<sup>44</sup> *Id.*

<sup>45</sup> *See, e.g.,* Statement of Sen. Rockefeller, S. 888 (Feb. 17, 2012) (“This legislation will also help ease the Nation’s growing spectrum shortage, through the auction of new spectrum to commercial providers.”); *id.* at S. 889 (noting the Spectrum Act “gives the FCC the authority to use part of the spectrum relinquished by television broadcasters in the incentive auction to create nationwide guard bands that can be used for unlicensed use, including in high value markets that currently have little or no white spaces today.”); Statement of Sen. Leahy, S. 889 (Feb. 17, 2012) (“The voluntary spectrum auctions that Congress has approved today are an important step in freeing up the airwaves for new and innovative uses.”).

<sup>46</sup> NPRM, 27 FCC Rcd. at 12,361 ¶ 10.

<sup>47</sup> S. 889 (Feb. 17, 2012).

the border if spectrum allocations were modified from the carefully negotiated existing signals.”<sup>48</sup>

The policies of the Spectrum Act, therefore, support the textual arguments for new pre-auction agreements with Canada and Mexico. By failing to conclude these agreements, the FCC would either repurpose less than the maximum amount of spectrum possible (because some border stations would remain in spectrum that otherwise could have been auctioned) or harm existing border broadcasters that choose not to participate in the auction (because they would be isolated in higher frequency spectrum). Both of these outcomes are in conflict with Congress’s and the FCC’s stated policy goals.

### **CONCLUSION**

For the foregoing reasons, the FCC should negotiate new agreements with Canada and Mexico before the 600 MHz incentive auction begins in order to comply with the text and purpose of the Spectrum Act, as recognized in the Commission’s own statements. This approach will also prevent the risk of substantial cross-border interference, guarantee that the maximum amount of spectrum is available for the forward auction, and ensure that television broadcasters that participate in the reverse auction are fully reimbursed.

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<sup>48</sup> *Id.*



## **DECLARATION OF BRUCE FRANCA**

I, Bruce Franca, hereby declare under penalty of perjury that:

1. I am Vice President of Spectrum Policy, Strategic Planning at the National Association of Broadcasters (“NAB”).
2. I graduated from Pratt Institute in Brooklyn, New York, and did graduate work in electrical engineering at the George Washington University in Washington, D.C.
3. Prior to joining NAB in 2011, I was Vice President for Policy and Technology at the Association for Maximum Service Television (“MSTV”).
4. Before joining MSTV, I worked at the Federal Communications Commission (“FCC”). I joined the FCC in 1974 as an engineer in the Aviation and Marine Division of the Safety and Special Radio Services Bureau (now the Wireless Telecommunications Bureau). I have also held positions in the Office of Plans and Policy and the Mass Media Bureau. I was a member of the U.S. Delegation to the 1983 Regional Administrative Radio Conference for the Direct Broadcast Satellite (“DBS”) Service and helped develop the plan for the deployment of DBS satellites in Region 2 (*i.e.*, the majority of the Western hemisphere).
5. I joined the Office of Engineering and Technology (“OET”) as Deputy Chief in 1987 and became Chief of OET in 2005. During my tenure at OET, I led the FCC’s technical efforts with regard to digital television (“DTV”) and the development of the DTV Table of Allotments, for which I was awarded the Chairman’s Special Achievement Award in 1996. I have also participated in a number of international coordination-related activities, and I am currently an active member of the FCC’s Advisory Committee for the 2015 World Radio Conference.

6. During my tenure in OET, I was the U.S. Chair and Co-Convener (along with my Canadian counterparts) of the Radio Technical Liaison Committee (“RTLCL”). The RTLCL is tasked with negotiation and coordination of the use of radio along the U.S.-Canada border. As Chair of the RTLCL for more than 20 years, I was involved in the development and implementation of numerous agreements and understandings between the FCC and Industry Canada, including interim PCS agreements, agreements involving Satellite Digital Audio Radio Systems, agreements concerning the use of public safety frequencies, and all activities related to digital television. I have also participated in similar activities headed by the U.S. Department of State related to DTV with Mexico.
7. Radio frequencies span national borders. Thus, the FCC and equivalent regulatory authorities in Canada and Mexico have reached international agreements on spectrum allocation in order to promote spectrum and technical harmonization and to avoid cross-border interference.
8. During the DTV transition process, international coordination agreements were reached with Canada and Mexico *before* any significant implementation of DTV by U.S. stations occurred.
  - a. The FCC opened a docket to begin the DTV transition in 1987. The entire process of transitioning all broadcasters from analog to digital took over two decades, generally beginning on May 1, 1999, and ending on June 12, 2009 (after Congress delayed the statutory deadline for the transition.).
  - b. Both Canada and Mexico were invited to participate as observers in the FCC’s DTV advisory committee early in the process. As early as 1992, coordination

discussions commenced with Canada and Mexico. In fact, in the July 16, 1992 DTV rulemaking, the Commission stated: “We have initiated coordination activities with both the Canadian and Mexican governments for proposed [DTV] allotments in the border areas. We expect to address coordination arrangements . . . in a timeframe consistent with our allotment and assignment schedule.”<sup>1</sup>

- c. In addition, at the time the *Sixth Report and Order* was adopted in April 1997, the Commission noted the DTV Table had been coordinated with the Canadian and Mexican administrations and found generally acceptable to them, and that the interim agreements were being finalized. I was the chief architect and drafter of these agreements and was involved in all coordination activities.
- d. The international coordination agreement with Canada was made effective as of September 22, 2000, and the agreement with Mexico made effective as of July 22, 1998.
- e. During the DTV transition, there were also individual broadcasters that requested new channel assignments reflecting changes from the agreed-upon DTV Table. Such requests were subject to the international coordination processes set forth in the international agreements and letters of understanding. These additional coordination steps usually took substantial amounts of time to complete.

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<sup>1</sup> *Second Further Notice of Proposed Rule Making* (Docket 87-268) (July 16, 1992).

9. The Canadian and the Mexican agreements resulting from the DTV transition continue to govern frequency coordination between the respective countries. Both agreements have two principal components. *First*, the agreements specify DTV allotments, by channel, for stations within 400 kilometers of the U.S.-Canada border and within 275 kilometers of the U.S.-Mexico border. *Second*, the agreements lay out the coordination procedures that a party must go through to implement a new DTV allotment (*e.g.*, to accommodate a new station or change a station's assigned channel to a new channel).
10. The agreement with Canada provides, for example, that if the new allotment will meet existing spacing requirements, the administration implementing the new allotment must notify the other country and wait 21 days to give the opportunity for an objection to be lodged. If the new allotment does not meet spacing requirements then various studies must be performed and included with the notification, and 45 days must be provided for any notice of objection to be lodged. Similarly detailed rules exist regarding Mexico. Given the repacking and extensive reallocation of channels that will occur as part of the incentive auction, in my opinion, the only means of successfully coordinating frequencies for border stations would be for the FCC to conclude negotiations with Canada and Mexico on new agreements that specify channel assignments for all border stations as part of the development of a new national band plan.
11. In my opinion, it is not an acceptable approach for the FCC to merely ignore the border regions and adopt a band plan—that strands border stations on existing channels that are incompatible with the use of spectrum in other parts of the country.

Such an approach would result in inefficiencies, not only risking interference, but also potentially clearing less spectrum for wireless carriers and, consequently, generating less revenue during the forward auction. In these border regions, either “guard bands” and/or large separation distances would be required between broadcast and wireless operations to avoid interference between services. Neither TV nor wireless could operate in these guard bands or in these geographic regions, making for an inefficient plan and less spectrum available for sale in the auction.

12. Historically, Canada and Mexico have been interested in having harmonized allocations with the United States, meaning that the same spectrum is used for similar purposes on both sides of a border. If the U.S. seeks to repack television stations along the border below a certain channel and make the recovered spectrum available for wireless operations, Canada and Mexico will likely want to preserve the ability to do the same and repack their own stations below that channel as well. This will complicate repacking along the borders, in my opinion, if the U.S. repacking approach fails to take into account the potential repacking in neighboring countries as well. A failure to coordinate with Canada and Mexico prior to determining station allotments will likely lead Canada and Mexico to reject U.S. proposals for the use of new channels along the border.
13. Section 6403(1)(B) of the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”), Pub. L. No. 112-96, 126 Stat. 156 (2012), provides the FCC may reassign television stations, and reallocate portions of the spectrum “subject to international coordination along the border with Mexico and Canada.”



14. The FCC acknowledged in its October 2, 2012, Notice of Proposed Rulemaking (“NPRM”) that it was required to coordinate changes in the authorizations of television stations with Canada and Mexico. It also noted its intent to work on new bilateral instruments with Canada and Mexico.
15. To date, the FCC has not reached coordination agreements with Canada and Mexico.
16. Given that there are hundreds of stations near both the U.S.-Canada and U.S.-Mexico borders that will need to be reassigned to lower frequencies in order to clear a sufficient amount of spectrum for the forward auction, the negotiations process with Canada and Mexico for new agreements that would enable the repacking required as a result of the incentive auction would likely take many months or even years to complete.
17. The incentive auction is currently scheduled for mid-2015. In Congressional testimony, Chairman Wheeler indicated that he did not believe international coordination agreements would be signed prior to the auction. The FCC has currently indicated it is involved in the negotiation process with Canada and Mexico, but has been silent on what is being discussed or what progress has been made. This is in notable contrast to the DTV transition, during which I and other FCC staff met frequently with broadcasters to update them on progress, and the FCC in a number of its actions in the DTV proceeding described the steps that had been taken.
18. To successfully reach new agreements with Canada and Mexico before the start of the incentive auction, the FCC would need to start substantive negotiations *now*. Even were negotiations to proceed without any delays whatsoever, given the time these

agreements would take to negotiate, the agreements still might not be in place if the FCC starts the auction in mid-2015 as currently planned.

19. If international coordination agreements providing a new table of station-by-station channel allotments are not concluded prior to the start of the incentive auction, I believe that substantial harms would result to broadcasters and to the public interest more generally.
20. *First*, for the incentive auction to work as the FCC has proposed, all three parts (the reverse auction, repacking, and the forward auction) must occur simultaneously or in quick succession. Indeed, identification of new channels for stations subject to the repacking process must occur during the incentive auction process. And those new channels must actually be available for use by stations that are repacked. For stations along the border this means that the use of those new channels must be successfully coordinated with Canada or Mexico.
21. A simple example of how long coordination can take is the recent experience of Lake of the Woods County. Lake of the Woods operated a number of TV translators on TV channels 52 to 59 in the relatively rural Minnesota counties of Lake of the Woods, Roseau and Koochiching. Since these TV channels had been reallocated for wireless use, all TV translator operations were required to cease on those channels by December 31, 2011. Lake of the Woods filed for replacement channels for its TV translators in March 2010. Given its proximity to the border, coordination with Canada was required. Seventeen months later in August 2011, the FCC notified Lake of the Woods that Canada objected and Lake of Woods' applications were dismissed. These were simple coordination requests given the remote geographical location and

the low power of TV translator operations. Yet it took 17 months for Lake of Woods to receive a negative answer, at which point the entire process of reassignment and coordination had to begin anew. Lake of Woods was finally granted licenses to operate its stations on new channels on June 7, 2012, over two years after it filed its application.

22. Here, with many border stations needing relocation in order to accomplish a repacking of any magnitude, absent a new framework agreement and the development of a new table of channels for U.S., Canadian, and Mexican television stations, it is not realistic to expect that coordination for the many channels within the border zones could be completed under the existing agreements prior to the time during which repacking must occur. From a ministerial standpoint alone, the submission of a large volume of individual station requests would be overwhelming. And, with existing congestion in some border regions, I expect that the process could take well over a year or more. It would therefore be impossible as a practical matter to complete international coordination efforts pursuant to the existing agreements and provide border stations with any certainty with regard to the channels on which they have to be relocated to.
23. Without a new agreement in place, it is highly likely that coordination in congested markets will take significant time and that border stations will fall well outside of the 3-year construction and reimbursement window.
24. *Second*, the FCC could decide not to coordinate with Canada and Mexico and unilaterally decide to move stations to new frequencies. Such an approach of moving stations unilaterally would violate the law by neglecting to follow the coordination

procedures laid out in the existing agreements with Canada and Mexico. Such an approach could also subject these stations to reduced operating parameters and loss of service area and population, or subject them to substantial interference from either wireless or Canadian operations.

25. *Third*, if the FCC does not coordinate with Canada and Mexico prior to the auction and decides not to move stations to new frequencies at all, this would result in different harms:

- a. If there are only a few border stations isolated in high channels, surrounded by wireless carriers, the television sets and antennas used to access those stations will be purchased by relatively fewer consumers, likely leading manufacturers to increase price and/or eliminate production for this niche market.
- b. Leaving border stations where they currently reside in the spectrum would mean a substantial portion of the spectrum near the border would not be repurposed, defeating a major purpose of the Spectrum Act.

26. *Fourth*, international coordination cannot be left until after the auction has concluded for the following reasons:

- a. Section 6403(e) of the Spectrum Act provides the FCC “may not” complete more than one reverse auction or more than one reorganization of television stations. Therefore, the FCC has only one opportunity under the Act to repack stations and ensure that those stations are assigned channels that will provide the same population and coverage area served as each station had prior to the auction.

- b. Broadcast television stations could also be harmed if the channels to which they are reassigned are based merely on the speculative hope that some future coordination will prove successful. Such an approach could result in the reassigned channel being ultimately rejected during the coordination process or perhaps ultimately approved, but only with the use of reduced operating parameters. These reduced operating parameters could include a lower antenna height or reduced power, resulting in either a loss of coverage area and population served or increased interference from wireless operations.
- c. Post-auction coordination could also harm broadcasters by frustrating the Spectrum Act's reimbursement requirement. Section 6403(b)(4) of the Spectrum Act provides a fund to reimburse stations for costs incurred as a result of moving frequencies. Reimbursements must be completed, however, within three years of the forward auction. The process of a station being assigned a new frequency, and then having to engineer and purchase new equipment and build a new facility can, under the best of circumstances, take the entire three years specified in the Act as the FCC's own sponsored report has recognized. NAB has estimated that the average cost to a station for changing frequencies will be in the range of \$3-4 million. If border stations are required to go through a lengthy coordination process before they can even be assigned new frequencies or know that those assigned frequencies are acceptable, they will likely not be able to complete construction on time and be reimbursed for all of their expenses within this three-year statutory window.



27. If the FCC coordinates with Canada and Mexico before the auction, the countries could identify potential replacement channels, develop improved coordination procedures, and create a harmonized spectrum approach on both sides of the border. Reaching these agreements would give both border stations and new wireless operations additional certainty and lead to a more successful auction.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Date: May 8, 2014



Bruce Franca